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19 JUL

MEMORANDUM FOR: Deputy Director for Operations

FROM: James N. Glerum
Director of Personnel

SUBJECT: Retroactive Promotion to GS-13 for [REDACTED]

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REFERENCE: Your memorandum, same subject, dated 25 June 1982

25X1 1. My staff and I have carefully reviewed your request to promote [REDACTED] to GS-13 retroactive to 13 December 1981. In an effort to determine the propriety of, and basis for, a correction, and, should that determination be affirmative, the proper effective date, my staff researched past cases, earlier opinions offered by the Office of General Counsel (OGC) and the procedures that led to [REDACTED] non-promotion. In our opinion, the circumstances described do merit a correction of the inequity that has occurred in her case.

25X1 2. However, based on the foregoing research, I have concluded that there is an impediment to promoting [REDACTED] retroactive to 13 December 1981. This conclusion is based on advice concerning the basis for determining administrative error. As you know, you do not follow the Agency's substantive rule which requires that employees have an opportunity to review additional material provided board and panels when that material conflicts with the personnel file record before the board or panel considers the information. Since the rule affording employees this opportunity is not mandatory in the Operations Directorate, its violation does not constitute administrative error of the type which permits retroactive promotions. We regret therefore, that we cannot make the promotion effective before the reconvention of the Panel and the final DDO decision following the Panel's review. I, therefore, am able to approve the promotion to be effective on 27 June 1982.

J. James

Distribution:

James N. Glerum

Orig - Addsee

2 - D/OP 1 - PPB

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OP/P&PS, [REDACTED] sjw (7/9/82)

RETYPE (7/15/82)

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2 July 1982

MEMORANDUM FOR: James N. Glerum
Director of Personnel

FROM: [REDACTED]
Deputy Director for Policy,
Analysis and Evaluation

SUBJECT: Retroactive Promotion - [REDACTED]

1. Regarding the retroactive promotion for [REDACTED] OGC has held in past cases that to apply the rules of the Back Pay Act (BPA), which the Agency must follow as it is directed to all executive agencies, there must be a violation of a mandatory procedural rule or a mandatory substantive rule. From Comptroller General cases, the firmer ground is violation of substantive rule. (See attachment for last OGC opinion on this subject.)

2. From the facts, it appears that an Agency-wide substantive rule was violated. The Precepts for CIA Personnel Evaluation Boards and Panels, approved by the DDCI on 6 May 1980 and forwarded to the Career Service Heads on 22 May 1980 require (para V.A.) the following:

"If the board or panel feels that this information as it related to performance or position is not clear, it may request additional information or briefings by a knowledgeable officer. If this material conflicts with the record in the personnel file, a memorandum will be written and the employee will be afforded the opportunity to review the memorandum before the board or panel takes it into account."

In [REDACTED] case, she was not afforded the opportunity to review the additional material before the panel considered it. She reviewed the material after the panel concluded, objected to it, the panel reconvened and acted by recommending her promotion. Thus a substantive Agency rule was violated.

3. However, it also appears that the rule is not mandatory. The DO does not follow the rule that the individual reviews the material before the panel acts upon it. The DO cites time constraints and absences from Headquarters of many individuals under consideration as justification for presenting the facts to the individual after the panel has concluded. We find no record of DDCI approval for this exceptional practice.

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4. Thus, the substantive rule has not been enforced as mandatory so its violation cannot be cause to invoke the provisions of the BPA and allow retroactive promotion. We recommend either that the DO be directed to follow the provisions of the substantive rule above in the future, provide certification to that effect which would be an acknowledgement of the error which would allow [] promotion be made retroactive to 13 December 1981, or that [] promotion be effective as of the beginning of the pay period following the date of the DDO's approval.

5. I've discussed this with [] who indicates that the DO could not live with following the rule. In that case, we see no other avenue to legally allow the retroactive promotion. [] is unaware of the promotion and "will be tickled pink" with it regardless of the date. He appears to accept a June 1982 promotion date. If you agree, we will prepare a response to John Stein.

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Attachment

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